



GOVERNMENT'S TRIAL BRIEF

Nov. 12, 1997

- [Introduction/Facts](#)
- [Summary of Charged Bombs](#)
- [Elements of the Charged Offenses](#)
- [Evidentiary Issues](#)
- [Admissibility of Testimonial Evidence](#)
- [Foundational Questions Regarding Admissibility May Be Resolved Outside the Presence of the Jury Pursuant to FRE 104](#)
- [Defense Case](#)

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B. Allegations Regarding the FBI Laboratory Are Not Admissible to Impeach the Government's Expert Witnesses

Earlier this year the Department of Justice Office of the Inspector General released its report of investigation concerning allegations of wrongdoing and improper practices within certain sections of the FBI Laboratory. A copy of this report together with certain supporting documentation has been provided to the defense.

The allegations were brought to the attention of the OIG by Dr. Frederic Whitehurst, a scientist employed in the FBI Laboratory. According to the Executive Summary to the report: "Most of Whitehurst's allegations were not substantiated; some important one's were." GIG Report at 1. (18. *Due to the length of the GIG Report and the fact that it is not certain that the defendant will even raise this issue at trial, the government has not provided the court with a copy of the report at this time. Citations to the report at this Stage are principally for the benefit of the defense so they may verify the source and accuracy of the government's factual statements. The government will provide the Court with a copy of the GIG's report if this matter becomes an issue at trial, or earlier if the Court requests.*) Although the report is quite extensive and touches upon some of the most significant prosecutions in recent history, only one allegation relates to the Unabom case and with respect to that allegation, Whitehurst's claims were not substantiated. The allegation is against Thomas J. Mohanal, an explosives examiner whom the government intends to call as a witness in its case in chief. (19. *Whitehurst's allegations relate to an article which Mohanal published in the July, 1994, issue of Crime*

Laboratory Digest, a forensic science journal published by the FBI Laboratory in cooperation with the American Society of Crime Laboratory Directors. The article described 14 explosive devices attributed to the "Unabomber". *OIG Report* at 302. The article was published in an effort to develop investigative leads by describing the devices and disseminating the information to crime laboratories throughout the world. *Id.* Whitehurst claimed that the article contained false information and that before the article was published Mohnal should have checked the work of a previous explosives examiner who had performed work on the case. *Id.* As noted, the *OIG* concluded that Mohnal did not act improperly in publishing the article nor did they find any other misconduct by Mohnal. *Id.* at 302, 473. Whitehurst also made general allegations against Terry Rudolph, an explosives residue examiner who performed work on some of the earlier Unabom devices. The allegations do not relate specifically to any work Rudolph performed in the Unabom case. Furthermore, Rudolph left the Laboratory in 1988, long before Whitehurst's allegations surfaced and Mohnal will not be relying on any of his conclusions.) Furthermore, with the exception of Mohnal, no allegations were made in the report about any Laboratory employee whom the government intends to call as a witness at trial.

The government submits that Whitehurst's allegations including general allegations about the FBI Laboratory and the specific allegation relating to the Mohnal - are inadmissible for any purpose, and that the defendant should be barred from inquiring into the matter either in cross-examination of the government's witnesses or in his case in chief.

The government relies principally on United States v. Gonzalez, 938 F.Supp. 1199 (D. Del. 1996), which was a bombing case wherein the defendant sought to impeach an FBI explosives expert based on Whitehurst's allegations. Following conviction but before sentencing, the Assistant U.S. Attorney who prosecuted the case turned over documents which he had recently obtained from the Department of Justice relating to Whitehurst's allegations of "unprofessional workplace conduct and unscientific analyses" by certain personnel at the FBI Laboratory. One of these individuals had been the explosives expert who testified at the trial. Based on these documents the defendant moved for a new trial based on alleged Brady violations. *Id.* at 1201.

In denying the motion for new trial, the district court determined that there had been no Brady violation because the evidence disclosed in the Whitehurst documents were inadmissible. *Id.* at 1207 (citing Wood v. Bartholomew, 116 S.Ct. 7, 10 (1995)). The allegations included:

- (1) Failing to follow FBI Materials Analysis Protocol.
- (2) Keeping an inordinately sloppy and dirty work environment.
- (3) Failing to wash and sterilize laboratory glassware.
- (4) Rendering scientific opinions without a proper empirical basis for his conclusions.
- (5) Failing to label instrumental output from testing.
- (6) Being personally incompetent to testify as an expert in explosives analysis.
- (7) Making racial remarks in the workplace.
- (8) Using racist and sexist remarks in the workplace.

(9) Fabricating information and conclusions with no basis.

Id. at 1208-09.

The district court concluded that application of Federal Rule of Evidence 608 precluded admission of all nine categories, either because the evidence was not probative of the witness truthfulness or untruthfulness under 608 (a) (categories six, seven and eight) or they constituted specific instances of misconduct prohibited by 608(b) (remaining categories). Id. at 1209-10.

The government submits that Whitehurst's allegations against Mohnal pale in comparison to the allegations at issue in Gonzalez and are inadmissible for the same reasons identified by that Court. See United States v. Phibbs, 999 F.2d 1053, 1070-71 (6th Cir. 1993) (Probative value of FBI internal disciplinary investigation was substantially outweighed by threat of prejudice to government in light of resolution in favor of agent); see also United States v. Gonzalez, 71 F.3d 819, 835-36 (11th Cir. 1996) (district court properly excluded cross-examination regarding internal investigation of deputy marshal who was cleared of wrongdoing).

The government also submits that general allegations against the FBI Laboratory and allegations which do not implicate any witness who testifies for the government are simply not relevant and would risk confusing the jury with collateral issues. In United States v. Millan-Colon, 836 F.Supp. 1007 (S.D.N.Y. 1993) , an internal government investigation revealed corruption by members of the New York Drug Enforcement Task Force that had investigated and arrested the defendants for conspiracy to distribute heroin. At trial, the government sought an order to preclude the defendants from mentioning any aspect of the corruption investigation in their opening statements or cross-examining any witness regarding the investigation or the alleged corruption. In support of its motion, the government proffered that it did not intend to call any of the corrupt officers to testify nor seek to admit any evidence seized by them or for which they were in the chain of custody. Id. at 1011, 1013. In granting the government's motion, the Court ruled:

The Court finds that cross-examination of the Government's witnesses regarding the Task Force corruption investigation . . . would pose a serious Rule 403 problem as such cross-examination is clearly more prejudicial than probative. First, as the Government does not intend to offer any evidence seized by the corrupt officers and as the officers will not be in the chain of custody, the defendants' proposed cross-examination regarding the corruption investigation would clearly be beyond the scope of direct examination. . .

Second, . . . any testimony regarding [the officer's] corrupt acts has no bearing on the credibility of the Government's other witnesses and is completely collateral to the issue of the other witnesses' veracity. .

Third, as the Government indicates that it will not offer evidence seized by any officer implicated in the corruption

investigation and that those officers will not be in the chain of custody, any testimony regarding their misdeeds would be substantially more prejudicial than probative.

Id. at 1013. The Court also found that permitting evidence of the corruption investigation would cause jury confusion and would delay the trial. Id.

Based on the foregoing reasoning the government submits that permitting evidence of alleged improprieties in the FBI Laboratory regarding cases other than Unabom and alleged misconduct by persons who the government does not intend to call at trial is irrelevant, has no bearing on the credibility, competence or expertise of witnesses the government does call, and is only intended to confuse the jury.

DATED: 10/23/97

Respectfully Submitted,

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[back to top](#)


CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on October 22, 1997, she served a copy of the **GOVERNMENT'S TRIAL BRIEF (REDACTED VERSION)** by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es) , and by depositing said envelope and contents in the United States Mail at Sacramento, California or by depositing said envelope and contents in the inter-office mailbox at the Clerk's office, Federal Building, Sacramento, California.

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[back to top](#)

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